COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1162

COMMONWEALTH

vs.

CHARLES TOWNE.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

A jury convicted the defendant of violating a restraining order, G. L. c. 209A, § 7, intimidation of a witness, G. L. c. 268, § 13B, and wanton destruction of property, G. L. c. 266, § 127.[1] In this direct appeal, the defendant argues that (1) the judge erred in admitting evidence that the defendant assaulted the victim three years earlier, which the defendant characterizes as inadmissible propensity evidence; (2) the prosecutor misused that evidence in both her opening statement and closing argument, and, in closing argument, improperly inserted her personal opinion about a witness's testimony; (3) statements to police by a nontestifying bystander were both inadmissible hearsay and violated the defendant's confrontation rights; and (4) the judge erred in allowing testimony about

[1] The defendant was acquitted of aggravated assault and battery, G. L. c. 265, § 13A (b).

Facebook messages without authentication or foundation. We affirm.

1. Prior bad act evidence. The defendant argues that the judge erred in allowing the victim to testify, over objection, that the defendant had assaulted her three years earlier while he was intoxicated. The judge admitted this evidence only for the limited purpose of assessing the defendant's state of mind and the nature of the relationship between the defendant and the victim. The judge expressly, forcefully, and repeatedly instructed the jury -- both at the time the evidence was introduced and during the final charge -- that the evidence could not be used for any other purpose. See Commonwealth v. Almeida, 479 Mass. 562, 569 (2018), citing Commonwealth v. Forte, 469 Mass. 469, 480 (2014) ("no error in admission of prior bad act evidence where, among other things, jury instructions minimized potential for prejudicial effect"). The defendant nonetheless argues that the evidence constituted impermissible "propensity" evidence.

Although it is true, as the defendant argues, that other bad acts cannot be admitted for the purpose of proving a propensity to commit the crime charged, Commonwealth v. Helfant, 398 Mass. 214, 224 (1986), that is not what happened here. Instead, the evidence was introduced only for limited, permissible purposes. Id. The Commonwealth's theory of the

case was that the defendant and the victim had a contentious relationship and the defendant attempted violently to force his way into the victim's home despite her demand that he leave. In this context, the prosecution properly sought to develop the hostile nature of the parties' relationship. See Commonwealth v. Butler, 445 Mass. 568, 575 (2005). See also Commonwealth v. Bradshaw, 385 Mass. 244, 269-270 (1982) ("The prosecution was entitled to present as full a picture as possible of the events surrounding the incident itself").

The defendant has failed to show any risk that the jury did not follow the judge's limiting instructions, nor has he shown any undue prejudice. See Commonwealth v. Donahue, 430 Mass. 710, 718 (2000) (proper jury instructions can "render[] any potentially prejudicial evidence harmless"); Commonwealth v. Vera, 88 Mass. App. Ct. 313, 322 (2015). It is notable that the defendant was acquitted of the aggravated assault and battery charge, which was the charge most implicated by the prior bad act evidence.

2. Prosecutor's opening statement and closing argument. The defendant argues that the prosecutor misused the prior bad act evidence in her opening statement and closing argument, and improperly inserted her personal opinion about one of the Commonwealth's witnesses in closing. No objection was lodged to any of the statements, and so we review to determine whether

there was any error and, if so, whether that error resulted in a substantial risk of miscarriage of justice. See, e.g., Commonwealth v. Miranda, 458 Mass. 100, 114 (2010). "An error creates a substantial risk of a miscarriage of justice unless we are persuaded that it did not materially influence the guilty verdict. In making that determination, we consider the strength of the Commonwealth's case against the defendant (without consideration of any evidence erroneously admitted), the nature of the error, whether the error is sufficiently significant in the context of the trial to make plausible an inference that the jury's result might have been otherwise but for the error, and whether it can be inferred from the record that counsel's failure to object was not simply a reasonable tactical decision" (quotations, citations, and footnote omitted). Commonwealth v. Alphas, 430 Mass. 8, 13 (1999).

The Commonwealth correctly concedes that the trial prosecutor improperly argued that the defendant's prior bad act showed a propensity to commit the current charges. The prosecutor's use of the propensity evidence was at direct odds with the limited purpose for which the evidence had been admitted and invited the jury to make an impermissible propensity inference. Commonwealth v. McDonagh, 480 Mass. 131, 142 (2018). That said, we discern no substantial risk of a miscarriage of justice resulting from the error. The

Commonwealth's case was strong, and the defendant's own witness's testimony corroborated key aspects of it, including that the defendant went to the victim's home (an act that itself violated the protective order). Moreover, the prosecutor's erroneous argument bore only on the aggravated assault and battery charge. But, as we have noted above, the jury acquitted the defendant of this charge, thus undermining any claim of prejudice. Finally, the judge gave forceful and immediate curative instructions.

When taken in context, as they must be, we discern no error in the prosecutor's other statements in opening or closing. While the prosecutor's comment that "unfortunately for [the witness], she's not up on the law" seems unnecessarily cavalier, it was not impermissible. Nor did the comment inject the prosecutor's personal opinion or in any way impede the jury's fair consideration of the credibility of the witness. In any event, none of the statements have been shown to create a substantial risk of a miscarriage of justice, see Commonwealth v. Mack, 482 Mass. 311, 322-323 (2019), especially considering the judge's instructions.

3. Admission of nontestifying witness's statements. The defendant further contends that the police officer's testimony about what he was told by the victim's boyfriend (who did not testify) was inadmissible hearsay and violated the defendant's

right to confrontation under the Sixth Amendment to the United States Constitution. See Davis v. Washington, 547 U.S. 813 (2006); Crawford v. Washington, 541 U.S. 36 (2004).

The admissibility of an out-of-court statement is determined using a two-step inquiry. Commonwealth v. Nardi, 452 Mass. 379, 391 (2008). The statement must first be admissible under a hearsay exception. Id. "Then, the statement must be appraised under the criteria of Crawford-Davis and Commonwealth v. Gonsalves, 445 Mass. 1, 3 (2005) [,cert. denied, 548 U.S. 926 (2006)] to determine if it satisfies the confrontation clause of the Sixth Amendment,' id., that is whether the statement was testimonial." Id. at 391-392. The two pieces of testimony at issue here satisfied both steps of this inquiry.

As to the first statement, the officer testified that, immediately as he arrived at the scene of the violent domestic event, the victim's boyfriend yelled that "he [the defendant] ran down that way." The judge did not abuse his discretion in determining that this exclamation qualified as an excited utterance. A spontaneous or excited utterance is admissible if "(1) there is an occurrence or event 'sufficiently startling to render inoperative the normal reflective thought processes of the observer,' and (2) if the declarant's statement was 'a spontaneous reaction to the occurrence or event and not the result of reflective thought.'" Commonwealth v. Santiago, 437

Mass. 620, 623 (2002), quoting 2 McCormick, Evidence § 272, at 204 (5th ed. 1999). See Mass. G. Evid. § 803(2) (2019). "The Commonwealth must show that 'there was an exciting event that would give rise to the exception' and that 'the declarant displayed a degree of excitement sufficient to conclude that her statement was a spontaneous reaction to the exciting event, rather than the product of reflective thought.'" Commonwealth v. McCoy, 456 Mass. 838, 849 (2010), quoting Santiago, supra at 624-625. A judge's determination that a declarant's statement qualifies as an excited utterance "is entitled to great deference and will only be overturned if there was an abuse of discretion." Commonwealth v. Smith, 460 Mass. 385, 391 (2011).

Nor was the boyfriend's statement testimonial. "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." Davis, 547 U.S. at 822. The statement here was not made in response to police questioning, but rather was spontaneously offered to the responding officer to help him deal with an ongoing volatile

situation. See Commonwealth v. Burgess, 450 Mass. 422, 431 (2008).

Likewise, the officer's testimony concerning the boyfriend's call to 911 was neither hearsay nor testimonial. The officer testified that "[w]hen . . . [the boyfriend] called it back in he said . . . it was Charles Towne who was trying to break into the house." The judge limited the jury's use of this evidence, instructing them to consider it only as "it bears on why this officer took what actions she took and why she went where she went," and not for "the truth of the matter asserted." In other words, the statement was not admitted for its truth, but rather as a nonhearsay statement reflecting "the state of police knowledge which impelled the approach to the defendant." Commonwealth v. LaVelle, 414 Mass. 146, 155 (1993), quoting Commonwealth v. Miller, 361 Mass. 644, 659 (1972). "Statements are not inadmissible hearsay when they are not offered to prove the truth of the matter asserted, but, rather, are offered for a purpose whose relevance flows simply from the fact that the statements were made." Commonwealth v. Serrano-Ortiz, 53 Mass. App. Ct. 608, 614 (2002). Nor was the statement testimonial; it was made simultaneously with an ongoing domestic emergency, describing events as they were unfolding. See Michigan v. Bryant, 562 U.S. 344, 356-357 (2011).

4. Authentication. The defendant argues that the judge erred in permitting the victim's testimony about the substance of certain Facebook messages without proper authentication. Specifically, he contends that there was an insufficient factual basis to establish that the Facebook messages existed, that they were sent from the account of the defendant's friend, or that the defendant sent them. We disagree. The victim testified that (1) the messages were from the account of the defendant's friend, who was also his housemate and the person who drove the defendant to the victim's house; (2) the defendant identified himself in the messages as the sender; and (3) the content of the messages was specific to the defendant: his desire to see his children and his disapproval of the presence of the victim's boyfriend around the children. Without abusing his discretion, the judge could permissibly infer from these facts that the defendant authored the Facebook messages. See Commonwealth v. Meola, 95 Mass. App. Ct. 303, 308 (2019). Direct evidence of authorship was not required. Commonwealth v. Purdy, 459 Mass. 442, 447-448 (2011). Rather, the judge could determine that the "confirming circumstances" were sufficient to allow a reasonable

jury to conclude that the evidence was what its proponent claimed it to be. Id. at 448-489.

Judgments affirmed.

By the Court (Wolohojian, Hanlon & Desmond, JJ.[2]),

Joseph F. Stanton

Clerk

Entered: October 28, 2019.

[2] The panelists are listed in order of seniority.